

No. 412

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

OSWALD SOMMER,

Plaintiff in Error,

vs.

CARBON HILL COAL COMPANY, A CORPORATION, ORGANIZED UNDER THE LAWS OF CALIFORNIA, AND DOING BUSINESS IN PIERCE COUNTY, WASHINGTON,

Defendant in Error.

TRANSCRIPT OF RECORD.

In Error to the Circuit Court of the United States
for the District of Washington, Western
Division, Tacoma.

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*In the Circuit Court of the United States for the District
of Washington, Western Division.*

February Term, 1897.

Be it Remembered that on the 27th day of February, 1897, there was duly filed in said Circuit Court of the United States, for the District of Washington, Western Division, an affidavit and order in forma pauperis, in words and figure as follows, to-wit:

*In the Circuit Court of the United States for the District
of Washington, Western Division.*

OSWALD SOMMER,

Plaintiff,

vs.

CARBON HILL COAL CO.,

Defendant.

Affidavit (Forma Pauperis.)

State of Washington, }
Whatcom County. } ss.

Oswald Sommer, being first duly sworn, on oath says that he is a citizen of the State of Washington, and of

the United States. That he commenced the above-entitled cause in the Superior Court of Washington, for Pierce County, and that the same was removed therefrom to this court by the defendant; that he is unable to pay the costs in this court, because of his poverty, and is unable to procure bonds for the satisfaction of the same, and that he has a meritorious cause against said defendant as stated in his complaint herein, to which he refers for the purpose of this affidavit, and that he desires because of the poverty, as herein stated, of this plaintiff an order from this Honorable Court, allowing him to proceed herein, to have witnesses summoned without costs as by statute of the United States permitted.

His

OSWALD X SOMMER.

Mark

Signed before us as witnesses:

J. L. Quackenbush.

Jacob Beck.

Signed and sworn to this day of Feb. , before
me, the undersigned notary public.

[Notarial Seal]

J. L. QUACKENBUSH,

Notary Public.

[Endorsed]: Filed Feby. 27, 1897. A. Reeves Ayres,
Clerk.

*In the United States Circuit Court for the District of
Washington.*

OSWALD SOMMER,

Plaintiff,

vs.

CARBON HILL COAL CO.,

Defendant.

Order (Forma Pauperis.)

This cause coming on for hearing on the plaintiff's application for an order allowing plaintiff to proceed herein, and to have witnesses summoned without costs under the statutes made and provided, and it appearing that the same should be allowed:

It is therefore ordered by this Court that the plaintiff, Oswald Sommer, may proceed herein without costs to him, and the clerk is hereby ordered to file all papers and issue all process in this cause without costs or bonds for costs being furnished by said plaintiff, and marshal is hereby ordered to serve all process herein on the part of plaintiff without costs to said plaintiff.

Feb. 27, 1897.

C. H. HANFORD,

Judge.

[Endorsed]: Filed in the U. S. Circuit Court. Feb. 27, 1897. A. Reeves Ayres, Clerk. Saml. D. Bridges, Dep.

And afterwards, to-wit, on the 7th day of July, 1897, there was duly filed in said court, in said cause, an amended complaint, in the words and figures following, to-wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

OSWALD SOMMER,	}	No. 507.
Plaintiff,		
vs.		
CARBON HILL COAL COMPANY, a Corporation Organized under the Laws of California, and Doing Busi- ness in Pierce County, Washington.	}	

Amended Complaint.

Now comes the above-named plaintiff, Oswald Sommer, and complaining against the defendant, the Carbon Hill Coal Company, says:

1st.

That the said defendant is at this time, and was for the several years prior hereto, a corporation organized under the laws of California, and doing business in Pierce County, Washington, to-wit:

Owning and operating a certain coal mine known as the Carbon Hill Coal Mine, situated in Pierce County, Washington.

2d.

That the said plaintiff was, for a period of about eight years prior to and including the 22d day of June, 1896, in the employ of the said defendant at the said mine, digging and mining coal for the said defendant.

3d.

Plaintiff alleges that there are great accumulations of natural gas in the said Carbon Hill Mine, which has a tendency to fill the said mine, as the coal therein is being dug, making it impossible for operation, all of which the plaintiff well knew. And plaintiff alleges that with proper air and ventilation to the face of working places throughout the mine, as is required of defendant company under the laws of the State of Washington, the gas is not, and would not be, dangerous to the health or to the operation of said mine.

4th.

That the laws of the State of Washington, to-wit, chapter 81, Laws of 1891, entitled "An Act relating to the proper ventilation and safety of coal mines, etc.," provides in part: "Sec. 9. The owner, agent, or operator of every coal mine, whether operated by shaft, slope, or

drifts, shall provide and maintain in every coal mine a good and sufficient amount of ventilation for such persons as may be employed therein, the amount of air in circulation to be in no case less than one hundred (100) cubic feet for each person per minute, measured at the foot of the down cast, the same to be increased at the discretion of the inspector according to the character and extent of the workings or the amount of powder used in blasting, and said volume of air shall be forced and circulated to the face of every working place throughout the mine, so that the said mine shall be free from standing powder smoke and gases of every kind."

5th

That the said defendant, in accordance with said law, had in its employ one John Lowery on the 22d day of June, 1896, for the purpose of providing the said mine with air and overseeing and conducting, guiding, and managing the ventilation of the said mine for the proper escape, and in freeing the said mine from all gases and smoke of every kind for the safety of the employees of the said defendant, commonly known as miners. That the said John Lowery was a vice-principal of the said defendant company, and known as a fire boss, and not a fellow-servant of this plaintiff.

6th.

That on the said 22d day of June, 1896, the said defendant company ordered, directed and assigned this

plaintiff, as their servant, to mine coal in a certain part of the said mine, and to drive a chute leading from the gangway, which said chute was known as number two (2), and in pursuance of said order, direction, and assignment this plaintiff did on said day proceed to the face of said chute number two, which was at a distance at that time of about one hundred and twenty-five (125) feet from the said gangway, and connected with chute number one with two crosscuts, known as first and second crosscuts. That crosscut number one is the first crosscut up said chutes from said gangway, and crosscut number two is the second and last crosscut up said chutes from said gangway. That the crosscuts are made and provided between said chutes number one and number two for the purpose of forcing air through the same to the face of the working place in said chute number two by means of canvas. That when the face of the working place in said chute extends about forty feet above the gangway, the first crosscut is then made, and the air is then changed from the gangway to the crosscut up through chute No. two about forty feet above said first crosscut, the second crosscut is then made, and the first crosscut is then closed by a canvas gate by the said fire boss, and the air forced up through chute number one through the second crosscut to the face of the working place in said chute number two for the purpose of freeing same from gases and smoke.

7th

That at about the time of the accident hereinafter complained of this plaintiff was working at the face of said chute number two, which was about forty-five (45) feet above the second crosscut and that at a short time before said accident he noticed gas accumulating at the said working place, the face of said chute number two. That said accumulation of gas was due and owing to insufficient ventilation at the said working place, and the lack of ventilation at the said working place and face of said chute was due and owing to the negligence and carelessness of the said fire boss, John Lowery, and said defendant company, in this, to-wit: 1st. That the said John Lowery fixed, managed, and arranged the canvas gate in said crosscut number one, so as to leave a wide space or opening through which a great volume of the air provided for ventilation would and did pass down and out of said chute number two, and did not reach the face thereof, and an insufficient amount of air for ventilation was forced up said chute number one through the second crosscut to the said working place in said chute number two; and 2d. In the defendant ordering and providing crosscuts at the distances of forty (40) feet apart, whereas they should be not more than thirty (30) feet apart in their said mine, to insure ventilation and a sufficient amount of air at the face of the working places as provided by law.

That soon after noticing the said accumulation of gas this plaintiff complained to the said Lowery that there was gas accumulating at the face of the said chute number two, and notified said Lowery that said accumulation was due to an insufficient amount of air at the face of said chute, and complained to said Lowery of the opening in the said first crosscut as herein described, and then and there requested said Lowery to furnish this said working place with more air and better ventilation. But the said Lowery, vice-principal of said company, neglecting his duty in this respect, failed to fix and arrange the said canvas gate in said first crosscut, and failed and neglected to furnish the said working place in said chute number two with proper ventilation and willfully and neglectedly allowed the gas to accumulate at the face of said chute in large quantities.

That this plaintiff, in pursuance of his regular course of duty and employment, and thinking and believing that said Lowery had performed his duty according to law, and freed the face of said chute from gas, proceeded to the face of said chute for the purpose of lighting and setting off a charge of giant powder by a fuse thereto attached. And in his usual way and manner and practice in said mine, lighted a match for the purpose of lighting the said fuse, but that at the moment the match was lighted the gas which had accumulated at the face of the said chute, though the carelessness of and negligence of the said defendant company, exploded, throwing the plaintiff violently to the bottom of the said chute, burning and

mutilating the face and arms of the said plaintiff, and burning and destroying both of the said plaintiff's eyes so that the same are beyond recovery, so that the plaintiff will always remain blind during the remainder of his lifetime.

8th.

That this plaintiff has suffered great pain, and still suffers and will suffer great pain, as a result of the injuries complained about, making mental and bodily rest almost impossible.

9th.

That the accident complained of in the above paragraph was caused by the carelessness of the defendant company, in not having provided and maintained the proper circulation of air to the face of the said chute number two, the working place of this plaintiff, so that the same would be free from gas, as required by law.

10th.

That the plaintiff was a miner by trade, and that at the time of his injury was forty-three years of age, and in good bodily health and condition, and always considered a careful and cautious man in dangerous places while mining

the several years in the said Carbon Hill Mine. That he has dependent upon him for their support a wife and child. That at the time of his injury he was earning, and was physically able to earn, the sum of one hundred (\$100) dollars a month at his trade as a miner, and that the said company defendant by its said acts, deeds, negligence, and carelessness, has wrongfully deprived this plaintiff of his means of support, to his damage of fifty thousand dollars (\$50,000.00).

Wherefore, plaintiff demands judgment against the said defendant in the sum of fifty thousand dollars (\$50,000.00), and his costs and disbursements herein.

GOVNER TEATS,

Plaintiff's Attorney.

State of Washington, }
County of Whatcom, } ss.

Oswald Sommer, being first duly sworn, on oath says that is the plaintiff herein; has heard the above complaint read to him, and affirms that the matters and things herein stated are true.

His

OSWALD X SOMMER.

Mark.

In presence of:

August Kuchnoch.

J. L. Quackenbush.

Signed and sworn to before me this 3d day of July, 1897.

J. L. QUACKENBUSH,

Notary Public, Residing at New Whatcom, Washington.

Recd. Copy, July 6th, 1897.

Atty. for Deft.

[Endorsed]: Filed in the U. S. Circuit Court, Jul. 7, 1897. A. Reeves Ayres, Clerk. Saml. D. Bridges, Dep. Recd. Copy. J. M. Ashton, Jul. 6th, 1897.

—

And afterwards, to-wit, on the 26th day of July, 1897, there was duly filed in said court, in said cause a demurrer to the amended complaint, in the words and figures following, to-wit:

In the Circuit Court of the United States, for the District of Washington, Western Division.

OSWALD SOMMER,

Plaintiff,

vs.

CARBON HILL COAL COMPANY,

Defendant.

} No. 507.

Demurrer to Amended Complaint.

Comes now the defendant herein and demurs to the amended complaint in this action, and as grounds for demurrer alleges:

First.

That it appears upon the face of the amended complaint that the same does not state facts sufficient to constitute a cause of action against the defendant.

Second.

That this Court is without jurisdiction to hear and determine this action.

J. M. ASHTON,
Attorney for Defendant.

I, the undersigned, counsel for the defendant in this action, do hereby certify that the foregoing demurrer to the amended complaint is not filed for the purpose of delay and in my opinion the same is well founded in point of law.

J. M. ASHTON,
Counsel for Defendant.

[Endorsed]: Due service of within, by receipt of a true copy thereof, admitted this 26th day of July, 1897. Governor Teats, Attorney for Plff. Filed July 26th, 1897. A. Reeves Ayres, Clerk.

And afterwards, to-wit on Friday, the 15th day of October, 1897, the same being the 20th judicial day of the reg

alar July term of said Court—Present the Honorable CORNELIUS H. HANFORD, United States District Judge, presiding—the following proceedings were had in said cause, to-wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

OSWALD SOMMER,

Plaintiff,

vs.

CARBON HILL COAL COMPANY,

Defendant.

No. 507.

Order Sustaining Demurrer and Judgment.

This cause coming on to be heard in open court, and at a regular term thereof, on the 13th day of October, 1897, upon the demurrer of defendant to the second amended complaint herein, and the Court, having heard the arguments of counsel on behalf of both parties, did take the matter under advisement until this the 15th day of October, 1897, when at a regular term of this court, and in open court, the Court did order and adjudge that said demurrer be, and the same is hereby, sustained. Whereupon counsel for plaintiff desired an exception, and the same was then and is hereby allowed.

Counsel for plaintiff then announced that the plaintiff would stand upon said second amended complaint.

Whereupon, it is ordered and adjudged by the Court that said demurrer thereto having been sustained, that this action be, and the same is hereby, dismissed at plaintiff's cost. To which order plaintiff excepts, and the same is allowed by the court.

Thereupon counsel for plaintiff, in open court, gave oral notice of an appeal from said order and judgment to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, which notice is here and now entered of record herein.

C. H. HANFORD,

Judge.

O. K.

TEATS.

[Endorsed]: Filed in the U. S. Circuit Court. Oct. 15, 1897. A. Reeves Ayres, Clerk. Saml. D. Bridges, Dep.

And afterwards to-wit, on the 27th day of October, 1897, there was duly filed in said court, in said cause, the Assignment of Errors, in the words and figures following, to-wit:

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

OSWALD SOMMER,

Plaintiff,

vs.

CARBON HILL COAL COMPANY,

Defendant.

Assignment of Errors.

To the United States Circuit Court of Appeals for the
Ninth Circuit:

Now comes the above plaintiff in error, Oswald Som-
mers, by his attorney, Govnor Teats, and says that the rec-
ord and proceedings of the Court below in the above-en-
titled action, therein, there is material error in this:

1st. That the Court erred in sustaining the demurrer
of the defendant therein to the amended complaint of the
plaintiff therein, for the reason that said amended com-
plaint states a complete cause of action against the de-
fendant therein.

2d. That the Court erred in rendering judgment there-

in dismissing the plaintiff's action therein, for the reason that said judgment was contrary to law.

GOVNOR TEATS,
Attorney for Plaintiff in Error.

State of Washington, (ss.
Pierce County.)

Govnor Teats, being first sworn, says that he is plaintiff's attorney; that he served the above assignment of errors on the defendant, by delivering a copy of the same on its attorney, James Ashton, at his office, in Tacoma, Wash., Oct. 20th, 1897.

GOVNOR TEATS.

Signed and sworn to before me October 20, 1897.

[Seal]

A. H. GARRETSON,

Notary Public, Residing at Tacoma, Wash.

[Endorsed]: Filed in the U. S. Circuit Court. Oct. 27 1897. A. Reeves Ayres, Clerk. By Saml. D. Bridges, Dep.

And afterwards to-wit, on the 27th day of October, 1897, there was duly filed in said Court, in said cause, a petition for writ of error, in the words and figures following, to-wit:

*In the United States Circuit Court of Appeals for the Ninth
& Circuit.*

OSWALD SOMMER,

Plaintiff,

vs.

CARBON HILL COAL COMPANY,

Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit
Court of Appeals for the Ninth Circuit.

Now comes Oswald Sommer, plaintiff in error, and petitions this Honorable Court to allow a writ of error to be directed to the Circuit Court of the United States for the District of Washington, Western Division, to remove to this, the United States Circuit Court of Appeals for the Ninth Circuit, for a review thereof, the record in the case lately pending in said court below, wherein above-named plaintiff in error was plaintiff and the above-named defendant in error was defendant, and particularly the record of the judgment rendered by said Circuit Court in the said cause, wherein the said court below sustained the demurrer of the defendant to the amended complaint of the

plaintiff, and dismissed the said plaintiff's said cause at his costs; said judgment was duly entered on record therein on the 15th day of October, 1897; that plaintiff be allowed to perfect this appeal without filing a bond as required by law, and without costs and fees of the clerk or other officers of this court, upon his affidavit made and filed in this cause according to law.

Your petitioner respectfully states that he has this day filed herewith his assignment of errors committed by the Court below in said cause, and intended to be urged by your petitioner and plaintiff in error in the prosecution of this his suit in error.

Dated Oct. 27, 1897.

GOVNER TEATS,
Attorney for Plaintiff in Error.

Order Allowing Writ of Error.

Let a writ of error in the above cause issue as prayed for in the petition, without costs or fees of clerk or other officer of this court, and without filing the necessary bonds on appeal.

Dated Oct. 27th 1897.

C. H. HANFORD,
United States District Judge and one of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, presiding at the Circuit Court for the District of Washington.

State of Washington, }
 Pierce County. } ss.

Governor Teats, being first duly sworn, says that he is plaintiff's attorney, and that he served the above petition on defendant by leaving a copy of the same with James Ashton, its attorney, at his office in Tacoma, on Oct. 20th, 1897.

GOVNOR TEATS.

Signed and sworn to before me this 20th day of October, 1897.

[Seal]

A. H. GARRETSON,
 Notary Public, Residing at Tacoma, Wash.

[Endorsed]: Filed in the U. S. Circuit Court. October 27, 1897. A. Reeves Ayres, Clerk. By Saml. D. Bridges, Dep.

Clerk's Certificate to Transcript.

District of Washington, Western Division, }
 United States of America. } ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States, for the District of Washington, do hereby

certify the writings hereto attached to be a true transcript of the record and proceedings in case number 507, Oswald Sommer, plaintiff, vs. Carbon Hill Coal Company, Defendant, as the same remains on file and of record in my office.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court at my office in the city of Tacoma in said district, this the eighteenth day of November, in the year of our Lord, one thousand eight hundred and ninety-seven.

[Seal]

A. REEVES AYRES,

Clerk.

By Saml. D. Bridges,

Deputy.

Writ of Error.

UNITED STATES OF AMERICA —ss.

The President of the United States of America, to the Judges of the Circuit Court of the United States, for the District of Washington, Greeting:

Because in the record and proceeding, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Oswald Sommer, plaintiff, and Carbon Hill Coal Company, Defendant, a manifest error hath happened, to the great damage of the said plaintiff, Oswald Sommer, as by his complaint appears, and it being fit, that the error,

if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, together with this writ, so that you have the same at the City of San Francisco in the State of California, within thirty days from the date of this writ in the said Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 27th day of October, in the year of our Lord, one thousand eight hundred and ninety-seven, and of the independence of the United States the one hundred and twenty-second.

[Seal]

A. REEVES AYRES,

Clerk U. S. Circuit Court, District of Washington.

By Saml. D. Bridges,

Deputy.

The above writ of error is hereby allowed.

C. H. HANFORD,

U. S. District Judge, presiding in said Circuit Court.

[Endorsed]: Filed in the U. S. Circuit Court. Oct. 27,
1897. A. Reeves Ayres, Clerk. Saml. D. Bridges, Dep.

Citation.

UNITED STATES OF AMERICA—ss.

To Carbon Hill Coal Company, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Washington, Western Division, wherein Oswald Sommer is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 27th day of October, A. D. 1897, and of the independence of the United States, the one hundred and twenty-second.

[Seal]

C. H. HANFORD,

U. S. District Judge, presiding in said Circuit Court.

Attest:

A. REEVES AYRES,

Clerk U. S. Circuit Court, District of Washington.

By Saml. D. Bridges,

Deputy.

Service of within citation is hereby accepted this 29th
October, 1897.

[Seal]

J. M. ASHTON,
Attorney for Defendant.

[Endorsed]: Filed in the U. S. Circuit Court. Nov. 17,
1897. A. Reeves Ayres, Clerk. Saml. D. Bridges, Dep.

[Endorsed]: No. 412. In the Circuit Court of Appeals
for the Ninth Circuit. Oswald Sommer, Plaintiff in Er-
ror, vs. Carbon Hill Coal Company, a Corporation Organ-
ized under the laws of California, and doing Business in
Pierce County, Washington, Defendant in Error. Tran-
script of Record. In Error to the Circuit Court of the
United States for the District of Washington, Western
Division, Tacoma.

Filed Nov. 24, 1897.

F. D. MONCKTON,
Clerk.